United States Court of Appeals

for the Second Circuit

REPLY BRIEF

ORIGINAL 76-1182

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1182

UNITED STATES OF AMERICA,

Appellee,

v.

JANET TERRI,

Defendant-Appellant.

Appeal from a Judgment of Conviction in
The United States District Court for
thr Eastern District of New York

REPLY BRIEF FOR APPELLANT JANET TERRI

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REPLY BRIEF OF THE APPELLANT JANET TERRI

Appellant submits this Reply Brief pursuant to Rle 28 (c) of the Federal Rules of Appellate Procedure, in response to certain contentions in Points III and IV of Appellee's Brief. No issue or argument presented in this appellant's main brief is intended to be waived by the submission of this Reply Brief.

I

Appellee's Brief (p. 16) concedes that under the rule of Geaney, 417 F.2d 1116 (2d Cir., 1969) and Calarco, 424 F.2d 657 (2d Cir., 1970) (appellant's Main Brief, Point I), the record must show "a 'fair preponderance' of independent non-hearsay evidence" in order to justify the admission, against Ms. Terri, of the hearsay testimony of her alleged co-conspirators who pleaded guilty and testified as prosecu-

tion witnesses in expectation of lesser charges and lighter sentences (139a).

The record does not establish such a "fair preponderance" of non-hearsay evidence, and Appellee's Brief is mistaken in suggesting (p. 16) that even "circumstantial" evidence in the record would justify admission of alleged co-conspirators' hearsay testimony. Appellee's argument rests principally on the premise that the stolen goods were "in a basement playroom of her house" (emphasis supplied). That contention ignores and contradicts the record stipulation (354a-355a) made by the prosecution that the house on Harriet Place, Lynbrook, does not belong to appellant Terri, but to her parents. The implication of the statement that the house is "her house" is that Ms. Terri is in control of the premises and controls access to the house. There was no such proof.

FBI Agent Walsh testified that the building is "a one family or two family"house (8a). This gives no foundation for the implication of control.

Appellee's Brief is also inaccurate in characterizing the place where the goods were stored as "a basement playroom" of the house (p. 16). There was no testimony about a "playroom" in the basement or elsewhere; indeed, Agent Walsh testified that when he carefully searched the basement he saw a fish tank and observed that the basement was "sparsely" furnished (301a). The difference between a "playroom" which may be visited often, and

the sparse furnishing of a basement storage area, is in the context of this case a distinction with a difference. The concession that Ms. Terri was out of the state when the goods were placed in the house (377a) and for at least two (March 17-18) of the four days the prosecution says they were there (Appellee's Brief, p. 16) leaves no room for inaccurate characterization of the area where the goods were placed.

The tenuous connection of Ms. Terri to the conspiracy is similarly the only foundation for the conviction of possession of stolen property, under Count II of the indictment. Ms. Terri was, on the record, never in actual possession of even one of the stolen watches; her only "possession" was the constructive possession of residing in one apartment of the house in which the goods were placed in her absence. As we have demonstrated in our main Brief, she was not present when the watches arrived, or when they were removed, and there was no proof that she was actually in the house at any time when the goods were there. Without the hearsay evidence admitted, as we urge improperly, against her, there is not even any basis for a finding of constructive possession.

The connection of Ms. Terri with the conspiracy rests on the vague testimony of the alleged co-conspirator Schoenly that on two occasions -- the second after the arrests had been made -- Ms. Terri was in the bar he operated when other persons discussed aspects of the crime and the investigation. None of these statements was attributed by any witness to her. Nothing she was seen or claimed to have done was an overtly criminal act,

or necessarily implied criminal knowledge at the time she is said to have made a phone call of inquiry to a truck rental service (the sole Overt Act with which she was charged) (7a-8a).

Shorn of the unjustified inferences that the Harriet Place house was Ms. Terri's property and that its basement was her "playroom", Appellee's Brief fails to show a "fair preponderance" of non-hearsay evidence to support admission of the otherwise inadmissible co-conspiratorial testimony. The testimony of criminal acts by other alleged members of the conspirscy should not have been considered against Ms. Terri.

II

"It has long been recognized that the right to counsel is the right to the effective assistance of counsel", as the Supreme Court noted in McMann v. Richardson, 397 U.S. 759 at 770 n (1970) (vacating judgments of this Court with respect to the matters to be considered on petitions for habeas corpus following State court convictions). In the present case, the ineffectiveness of counsel's assistance to Ms. Terri in fact constituted her trial "a mockery of justice" within the rule set forth in United States v. Wight*, 176 F.2d 376, 379 (2d Cir., 1949), cert.den. 338 U.S. 950 (1950).

Wight's situation does not necessarily shock the conscience. Counsel was appointed for that defendant on the first call of the calendar, conferred with him, and was told by the defendant that he refused to plead guilty. The case was not tried, however; on the second call, the defendant surprised his counsel be announcing a guilty plea. There was no dispute about the facts, but only about whether obtaining valuables while fraudulently garbed as an enlisted man came within the prohibition of such conduct while disguised as "an officer or employee of the United States" (176 F.2d at 377-378). The circumstances surrounding Wight's plea of guilty failed to shock this Court. They are far removed from Ms. Terri's situation.

* Erroneously cited in Appellee's Brief, p. 18, as "United States v. Wright".

Ms. Terri was, by contrast, faced with an indictment, for conspiracy and possession of stolen goods in interstate commerce, formidable to a lay an. The Supreme Court has repeatedly recognized that conspiracy indictments require assistance of counsel for defendant more than any other non-capital crime. The assertion (Appellee's Brief, p. 12) that Ms. Terri faced issues "hardly complicated" begs that question.

Even a highly educated woman of great intelligence was held by the Supreme Court to be unlikely to be able to cope with a charge of conspiracy. Von Moltke v. Gillies, 332 U.S. 708 (1948). The language of Mr. Justice Black's opinion on behalf of 4 Justices in Von Moltke is instructive (332 U.S. at 722):

> "And especially misleading to a layman are the overt act allegations of a conspiracy. Such charges are often, as in this indictment, mere statements of past associations or conferences with other persons, which activities apparently are entirely harmless standing alone. A layman reading the overt act charges of this indictment might reasonably think that one could be convicted under the indictment simply because he had, in perfect innocence, associated with some criminal at the time and place alleged. The undisputed evidence in this case that petitioner was concerned about many of these legal questions -- such as the significance of the overt act charges, and her possibilities of defense should all her co-defendants plead guilty -- emphasizes her need for the aid of counsel at this stage."

In the present case, the concern anticipated by the Countess von Moltke about overt acts on their face innocent, and about the effects of guilty pleas of co-defendants, were actually realized on the trial of Janet Terri.

Mr. Justice Frankfurter, whose view that Von Moltke should be remanded for further findings prevailed, was even

more explicit about the necessity for effective legal counsel at every stage of defense on a conspiracy charge, writing (332 708, 727 at 727-728):

> "But it would be very rare, indeed, even for an extremely intelligent layman to have the understanding necessary to decide what course was best calculated to serve her interests when charged with participation in a conspiracy. The too easy abuses to which a charge of conspiracy may be put have occasioned weighty animadversion by the Conference of Senior Circuit Judges, Report of the Attorney General 1925, pp. 5, 6; and see also the observations of Judge Learned Hand in United States v. Falcone (CCA 2d NY) 109 F.2d 579, 581, affd, 311 US 205. The subtleties of refined distinctions to which a charge of conspiracy may give rise are reflected in this Court's decisions. See, e.g., Kotteakos v. United States, 328 US 750. Because of its complexity, the law of criminal conspiracy, as it has unfolded, is more difficult of comprehension by the laity than that which defines other types of crimes.Thus, as may have been true of petitioner, an accused might be found in the net of a conspiracy by reason of the relation of her acts to acts of others, the significance of which she may not have appreciated, and which may result from the application of criteria more delicate than those which determine guilt as to the usual substantive offenses. * * *"

Equally, preparation of Ms. Terri's defense to the conspiracy charge in this indictment required nice analysis of her conduct in relation to the acts of other defendants and non-defendant co-conspirators, and inquiry into the facts of such relationships, which her trial counsel had no opportunity to make and in any event did not make.

The Supreme Court has "many times repeated * * * that it is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel." White v. Ragen, 324 U.S. 760, at 763-764. White was a defendant in

an Illinois state prosecution, held entitled to a hearing before the Federal District Court because of the supervening importance of the constitutional claims to right of counsel and due process, even before the decision in Gideon v. Wainwright, 372 U.S. 335 (1963) clarified the applicability of the Sixth Amendment to State felony prosecutions.

Thus Janet Terri's trial on conspiracy charges, which began a few minutes only after she first heard of and met her trial counsel, who had no opportunity to investigate or prepare a defense or subpoena witnesses and did not even confer with her pretrial assigned counsel, and which resulted in felony convictions, was indeed a "mockery of justice" violative of the Sixth Amendment, which should shock the conscience of this Court.

In the past several years, Courts of Appeal of other Circuits have abandoned the "mockery of justice" standard even for collateral attacks by writ of habeas corpus on State felony convictions, substituting the test of "competent representation" or specific requirements for reasonably competent representation -- all of which include, inter alia, investigation of the facts. MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir., 1960); King v. Beto, 429 F.2d 221 (5th Cir., 1970); Coles v. Peyton, 389 F.2d 224 (4th Cir., 1968); Moore v. United States, 432 F.2d 730 (3rd Cir., 1970), United States v. DeCoster, 487 F.2d 1197 (D.C. Cir., 1973). Even the Eighth Circuit, adhering to the "mockery of justice standard" has warned that it should not "be used as a

shibboleth to avoid a searching evaluation of possible constitutional violations" (McQueen v. Swenson, 498 F.2d 207, at 214 [8th Cir., 1974], reversing a Federal District Court's denial, without hearing, of habeas corpus, on the ground that failure of defense counsel to conduct an investigation and bring exculpatory witnesses to the trial of a State criminal indictment was such ineffective representation as to violate the Sixth Amendment).

Appellee's brief (p. 20) suggests that trial counsel's satisfaction, before the trial began, with his own ability to conduct the defense without preparation, should be considered as minimizing the deprivation suffered by Ms. Terri. On the contrary, as the trial progressed his inability became obvious even to himself. He had not even been able to "clear [his] calendar" to attend all sessions of Ms. Terri's trial (247a) While purporting to conduct the cross-examination of the principal witness, Schoenly, for the prosecution, Mr. Kaplan stated (309a):

> "* * * -- if I had been in the case a little earlier I would have had pictures of inside the bar." [I.e., the premises of the Tic Toc Bar where appellant Terri allegedly heard incriminating conversation.]

He had no such photographs to offer for the defense.

The record (quoted in appellant's Main Brief) could hardly set forth more clearly the vociferous protests, from

the start of the trial proceedings, against deprivation of the effective assistance of counsel. The Trial Court offered her the alternative of "carry[ing] on her own defense without counsel" -- an alternative which violated the Supreme Court's standards for defense of a conspiracy charge, as we have seen (supra, pp. 6-7). Mr. Kaplan's absence on the third day of trial, while disapproved by the Trial Court, again produced no action by the Court to protect Ms. Terri. In the circumstances, it was clear that she would get no assistance, and would only risk being held in contempt, by reiterating protests on subsequent trial days. The suggestion that she should have risked such a consequence, in a jury trial, made in Appellee's Brief (p. 20) compounds the error below.

Appellee's Brief further attempts to justify the inadequacy of Ms. Terri's representation by suggesting (p. 22) that it was based on a strategy of "dissociating Ms. Terri from the other defendants in the eyes of the jury." If that had been her counsel's defense strategy, it was wholly defeated and abandoned when her trial counsel absented himself and left her representation in the hands of Messrs. Corbett and O'Brien, counsel for two other defendants (Walsh and Grimsley, respectively). Even the Trial Court realized that these lawyers had "possible adverse interests". In any event, the conduct wholly dissipated any planned separation of Ms. Terri's position from that of the other defendants. Under the familiar rule of Glasser v. United States, 315 U.S. 60, at 70 (1942) "the

'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously reprrsent conflicting interests." Glasser was an experienced criminal lawyer and prosecutor, but his conviction was reversed on this ground; Ms. Terri, a barmaid bewildered by conspiracy indictment and a long, multiple-defendant trial, deserves no less. The "solicitude for the essential rights of the accused" which the trial judge has the duty to exercise (315 U.S. 60, at 71) was absent here.

In its brief the Government emphasizes (at p. 12) that the boxes of stolen watches were "prominently labelled 'Flying Tigers Airlines' * * *." Appellant Terri was not shown ever to have seen the boxes; and there is no evidence that if she had seen them she could have read the labelling, there being no evidence that she can read or write. She is a barmaid (98a) and judicial notice can be taken that many decent women* obtain such jobs because illiteracy disqualifies them for clerical employment. If called as a witness in her own defense as she should have been, Ms. Terri would have had the opportunity to testify positively that she never saw the boxes and that if she had seen them she was incapable of reading the labels by reason of illiteracy.

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* She worked as a barmaid at night (98a) and personally picked her children up at the end of their school day in the afternoon, as FBI Agent Walsh said he knew (307a).

III

Appellee's Brief (pp. 21-22 and Appendix) with egregious impropriety attempts to argue on the basis of a hearsay statement, which never appeared in the record and which could not have entered into the jury's deliberations. The improper matter should not be considered. Johnson v. United States, 426 F.2d 651, 656 (D.C. Cir., 1970), cert. dism., 401 U.S. 846 (1970).

The conviction should be reversed and the indictment dismissed.

New York, New York
23 August 1976

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA, : Docket No. 76-1182

Appellee, :

v. : AFFIDAVIT OF SERVICE BY MAIL

JANET TERRI, :

Defendant-Appellant :

- X

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 3111 Brighton 1st Place, Brooklyn, N.Y., 11235.

That on the 23rd day of August, 1976 deponent served the annexed REPLY BRIEF FOR APPELLANT JANET TERRI on

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attorneys for the parties in this action, the addresses indicated above being those designated by said attorneys for that purpose by depositing two true copies f same enclosed in a postpaid properly addressed wrapper, in the Bryant Station Postoffice, on West 43rd Street, New York, N.Y. 10036.

Mark Chaddock
MARK CHADDOCK

Sworn to before me this
23rd day of August, 1976.

George Cohen

GEORGE COHEN
Notary Public, State of New
No. 31-0602100
Qualified in New York County
Commission Expires March 30, 1977